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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOAQUIN MURRIETTA MARTINEZ,
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Petitioner,

v.

Respondent.

Civil No. 13cv1457-BTM (WVG)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a San Diego County Jail inmate, is proceeding pro se with a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging a state court conviction. This action is subject to dismissal because Petitioner has failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to allege exhaustion of state court remedies. Accordingly, the Court dismisses the Petition without prejudice and with leave to amend.

FILING FEE REQUIREMENT

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than September 3, 2013**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee. A blank Southern District of California in forma pauperis application will be provided to Petitioner along with a copy of this Order.

1 **FAILURE TO NAME PROPER RESPONDENT**

2 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On
3 federal habeas, a state prisoner must name the state officer having custody of him as the
4 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28
5 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which the petitioner
6 is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas petition fails to
7 name a proper respondent. See id.

8 The warden is the typical respondent. However, “the rules following section 2254 do not
9 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
10 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
11 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
12 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
13 be the state officer who has official custody of the petitioner (for example, the warden of the
14 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

15 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
16 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
17 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
18 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
19 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
20 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
21 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
22 at 895.

23 Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the
24 Petition filed in this action, Petitioner must name the officer or warden in charge of the jail or
25 state correctional facility in which Petitioner is presently confined or the Director of the
26 California Department of Corrections and Rehabilitation. Brittingham v. United States, 982 F.2d
27 378, 379 (9th Cir. 1992) (per curiam).

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FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

The Petition lists two claims. (See Pet. at 6-7.) The first ground for relief, which Petitioner contends he has presented to the state supreme court (id. at 6), consists merely of a statement that Petitioner is entitled to various rights under the federal Constitution, but contains no supporting facts and does not allege that Petitioner was deprived of any of the listed rights. (Pet. at 6.) Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of

1 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
2 United States.” See 28 U.S.C. § 2254(a). With respect to ground one, which is the only claim
3 Petitioner indicates he has presented to the state supreme court, Petitioner does not claim that
4 he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28
5 U.S.C. § 2254. Ground one therefore does not present a federal claim.

6 The second ground for relief, which Petitioner contends has not been presented to the
7 state supreme court (Pet. at 7), contains factual allegations which, liberally construed, present
8 a claim for violation of Petitioner’s federal Constitutional right to the effective assistance of
9 counsel. (See id.) Accordingly, the only claim for relief presented in the Petition (ground two)
10 has not, according to Petitioner, been presented to the state supreme court. The burden of
11 proving that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d
12 1103, 1104 (9th Cir. 1981). Here, Petitioner has not alleged exhaustion of state court remedies
13 with respect to any federal claim presented in the Petition. He has therefore failed to allege
14 exhaustion as to any claim presented in the Petition, and the Petition is subject to dismissal. See
15 Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (“Once a district court determines that
16 a habeas petition contains only unexhausted claims, it need not inquire further into the
17 petitioner’s intentions. Instead, it may simply dismiss the habeas petition for failure to
18 exhaust.”), citing Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).

19 The Court cautions Petitioner that a one-year period of limitation applies to a petition for
20 a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The
21 limitation period shall run from the latest of:

22 (A) the date on which the judgment became final by the
23 conclusion of direct review or the expiration of the time for seeking
such review;

24 (B) the date on which the impediment to filing an application
25 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
26 by such State action;

27 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been
28 newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

1 (D) the date on which the factual predicate of the claim or
2 claims presented could have been discovered through the exercise
of due diligence.

3 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

4 The statute of limitations does not run while a properly filed state habeas corpus petition
5 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
6 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
7 when its delivery and acceptance [by the appropriate court officer for placement into the record]
8 are in compliance with the applicable laws and rules governing filings.”); Bonner v. Carey, 425
9 F.3d 1145, 1149 (9th Cir. 2005) (holding that a state application for post-conviction relief which
10 is ultimately dismissed as untimely was neither “properly filed” nor “pending” while it was
11 under consideration by the state court, and therefore does not toll the statute of limitations), as
12 amended 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations
13 runs while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

14 CONCLUSION AND ORDER

15 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
16 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
17 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
18 Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner
19 has failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to
20 allege exhaustion of state judicial remedies.

21 To have this case reopened, Petitioner must, no later than **September 3, 2013**, pay the
22 \$5.00 filing fee or submit adequate proof of his inability to pay the fee, **and** file a First Amended
23 Petition that cures the pleading deficiencies set forth above. The Clerk of Court shall send
24 Petitioner a blank Southern District of California amended petition form and a blank Southern
25 District of California in forma pauperis application along with a copy of this Order.

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1 Petitioner is advised that if he has not submitted a First Amended Petition alleging
2 exhaustion of state court remedies before **September 3, 2013**, he will have to start over by filing
3 a completely new habeas petition in this Court which will be given a new civil case number.

4 **IT IS SO ORDERED.**

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6 DATED: July 8, 2013

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8 BARRY TED MOSKOWITZ, Chief Judge
United States District Court

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